IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JORGE HERNANDO MORENO ESCOBAR, Petitioner, v. U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE Respondent.	:	MISCELLANEOUS ACTION NO. 05-0048

Memorandum and Order

YOHN, J. May ___, 2005

Currently pending before the court is petitioner Jorge Hernando Moreno Escobar's motion for resolution of an immigration detainer noticed against him by the United States Immigration and Naturalization Service ("INS")[1] on October 1, 1997.

For the following reasons, petitioner's motion will be denied, and his action will be dismissed with prejudice.

FACTUAL & PROCEDURAL BACKGROUND

On October 25, 1994, petitioner, a citizen of Colombia, was sentenced in the Philadelphia County Court of Common Pleas to twenty to forty years imprisonment for two counts of third-

[1] On March 1, 2003, the INS was transferred from the United States Department of Justice to the newly-created United States Department of Homeland Security. INS responsibilities have since been divided between two main components of the Homeland Security Department – the Directorate of Border and Transportation Security ("BTS") and the United States Citizenship and Immigration Services. The United States Immigration and Customs Enforcement (ICE), as part of BTS, now handles detainers.

degree murder. Petitioner is currently serving that sentence in the State Correctional Institution at Coal Township, Pennsylvania. On October 1, 1997, the INS noticed a detainer against him.[2] Since that date, no action has been taken on the detainer. Petitioner now moves the court to order a resolution of the detainer and have the immigration authorities go forward with removal proceedings.

DISCUSSION

While the decision to remove an alien from the United States is entirely that of the Attorney General, the Attorney General ordinarily "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231(a)(4)(A). In addition, "[n]o cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien." 8 U.S.C. § 1231(a)(4)(D).

Thus, not only can the immigration authorities not remove petitioner until his Pennsylvania term of incarceration is over, but petitioner is precluded from bringing an action such as this seeking to compel removal proceedings. The Third Circuit came to a similar conclusion when dealing with § 1231(a)(4)'s predecessor statute, which was codified at 8 U.S.C. § 1252(h) and stated as follows:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien

[2] Authorized immigration officials are empowered to issue detainers advising law enforcement agencies "that the Department seeks custody of an alien presently in the custody of that agency," and requesting "that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. §§ 236.1, 287.7, 1236.1. Pursuant to a detainer request, state or federal officials may hold an alien for forty-eight hours after his release date. 8 C.F.R. § 287.7(d).

> from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

In *Perez v. INS*, 979 F.2d 299 (3d Cir. 1992), the court concluded that under this provision, an alien who had already been ordered deported by an immigration judge but was still serving a term of federal incarceration for having been convicted of drug crimes could not "by mandamus or any other medium compel INS to deport her prior to the completion of her custodial sentence." *Perez*, 979 F.2d at 301 (quoting *Medina v. United States*, 785 F. Supp. 512 (E.D. Pa. 1992)).[3]

Petitioner seems to claim that Article III of the Interstate Agreement on Detainers Act ("IAD")[4] entitles him to the relief he seeks, because it requires that proceedings on the detainer be commenced within 180 days of the date petitioner requests such proceedings.[5] I conclude,

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[3] In *Soler v. Scott*, 942 F.2d 597 (9th Cir. 1991), a case discussed in *Perez*, the Ninth Circuit held that "the INS has a mandatory obligation under section 701 [of the Immigration Reform and Control Act of 1986 ("IRCA")] to begin deportation proceedings as expeditiously as possible following an alien's conviction of an offense making her subject to deportation." *Perez*, 979 F.2d at 300. In addition, the *Soler* court concluded that such an alien may bring an action in federal court under the Mandamus and Venue Act of 1962 or the Administrative Procedure Act to compel the INS to fulfill this obligation. *Soler*, 942 F.2d at 601-04. While it seems that *Soler* is helpful to petitioner here, it is no longer good law for two reasons. First, as stated in *Campos v. INS*, 62 F.3d 311 (9th Cir. 1995), the holding in *Soler* was superseded by § 225 of the Immigration and Nationality Technical Corrections Act of 1994, which "expressly bars actions for 'substantive or procedural' relief under" section 701 of the IRCA. *Campos*, 62 F.3d at 314. Second, the new (and now in force) § 1231(a)(4)(D), which expressly prohibits claims "to compel . . . consideration for release or removal of any alien," was not in effect at the time of the *Soler* decision.

[4] The IAD is codified in Pennsylvania at 42 Pa. Cons. Stat. § 9101, *et seq.*, and in the United States Code at 18 U.S.C. app. 2.

[5] Article III of the IAD, in pertinent part, states as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is

however, that petitioner's reliance on the IAD is misplaced, because civil detainers filed by immigration authorities have been held to not fall within the terms of the IAD. *See United States v. Gonzalez-Mendoza*, 985 F.2d 1014, 1016 (9th Cir. 1993) (holding that the IAD applies only to pending *criminal* charges in another jurisdiction, and that "the courts have declined to treat deportation as a criminal proceeding"). The *Gonzalez-Mendoza* court reasoned that Article III of the IAD requires that an "indictment, information or complaint" be disposed of within 180 days of a prisoner's request, and that an immigration detainer is neither an indictment nor an information nor a complaint. *Id.* Thus, petitioner's claim under the IAD is without merit.

In addition, it should be noted that if petitioner's motion were construed as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, it would have to be dismissed, because the lodging of a detainer does not put petitioner "in custody" under § 2241. *Garcia v. INS*, 733 F. Supp. 1554, 1555 (M.D. Pa. 1990); *Zolicoffer v. Dep't of Justice*, 315 F.3d 538, 539 (5th Cir. 2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162-64 (6th Cir. 1990); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir. 1988). Thus, the court would have no jurisdiction to consider the petition. *See Meck v. Commanding Officer, Valley Forge Gen. Hosp.*, 452 F.2d 758, 760 (3d Cir. 1971) (explaining that a federal court has subject matter jurisdiction over a habeas petition filed under § 2241 only when the petitioner is "in custody" at the time of the filing).

> pending in any other party state an untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

42 Pa. Cons. Stat. § 9101, art. III(a).

CONCLUSION

For all of the above stated reasons, petitioner's motion will be denied, and the action will be dismissed with prejudice.

An appropriate order follows.

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v.	:	MISCELLANEOUS ACTION
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Order

And now, this _____ day of May 2005, upon careful consideration of petitioner's motion for resolution of detainer and the response, it is hereby ORDERED that the motion is DENIED, and petitioner's action is DISMISSED with prejudice.

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William H. Yohn, Jr., Judge